NO. 80-1163

FILED

APR 2 1981

ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1980

PATRICK M. TRAPPER, NUNZIO JAMES LOMBARDO, DENNIS LOMBARDO, VINCENT SERGE LORUSSSO, CLARK WILLIAM OLDENBROOK,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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QUESTIONS PRESENTED

1. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE FAILURE OF PETITIONERS TO RELY ON THE RECORD BEFORE THE STATE APPELLATE COURTS TO PREPARE THE PETITION AND THE INCLUSION OF MATERIALS THEREIN WHICH THIS COURT MAY NOT CONSIDER.

2. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE FAILURE OF PETITIONERS TO ESTABLISH THAT THE INVESTIGATIVE STOP OF A VEHICLE AND THE BRIEF DETENTION OF ITS DRIVER BY A LAW ENFORCEMENT OFFICER WERE IN VIOLATION OF THE FOURTH AMENDMENT.

3. WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE FAILURE OF PETITIONERS TO ESTABLISH THAT THE SEARCH WARRANTS WERE ISSUED UPON AN INSUFFICIENT SHOWING OF FACTS TO ESTABLISH PROBABLE CAUSE AND ILLEGALLY SEIZED EVIDENCE.

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CITATION TO THE OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported at 48 N.C. App. 481, 269 SE 2d 680 (1980).

JURISDICTION

The judgment of the North Carolina Court of Appeals was filed on September 2, 1980 and certified September 22, 1980, affirming the trial court's denial of Petitioners' Motion to Suppress. On November 14, 1980, the Supreme Court of

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North Carolina entered its Judgment Dismissing Appeal on Motion of Attorney General. The jurisdiction of this Court was invoked by Petitioners under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On January 14, 1979, Petitioners were served with Warrants for Arrest charging them with various crimes connected with the possession, sale and delivery of marijuana. On February 5, 1979, the Hyde Country Grand Jury returned true bills of indictment against Petitioners for various crimes connected with the possession, sale and delivery of marijuana.

Prior to trial, Motions to Suppress were filed on behalf of each of the Petitioners. These Motions alleged that the evidence sought to be introduced against Petitioners at trial was seized from Petitioners in violation of rights guaranteed to them by the Fourth Amendment to the Constitution of the United States. The Motions to Suppress were consolidated and heard on July 2-3, 1979, in the General Court of Justice, Superior Court Division, with the Honorable A. Pilston Godwin, Jr., presiding. On August 3, 1979, Judge Godwin entered an order denying the Motions to Suppress Evidence filed by Petitioners. (R. pp. 170-177).[1]

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[1]The symbol "R" refers to the Record on Appeal before the North Carolina Appellate Courts.

On August 13, 1979, Petitioners were brought to trial before the Honorable James R. Strickland at the August 13, 1979 Criminal Session of the Superior Court Division of the Hyde Country General Court of Justice. Petitioners Trapper, Lorusso, and Oldenbrook each pled guilty to the crime of possession of marijuana with the intent to sell and distribute. Petitioners Nunzio and Dennis Lombardo each pled guilty to the crime of felonious sale and delivery of marijuana. Each Petitioner received a suspended sentence and probation and by virtue of a plea bargain the remaining crimes against him were dismissed. (R. p. 4).

At the hearing on the Motions to Suppress, it was established that Deputy Sheriff Charlie Carrowan had followed a Ford truck with a camper body when it left the property of Petitioner Nunzio Lombardo at midnight on January 14, 1979. Subsequently, the vehicle being operated by Petitioner Trapper was stopped by Deputy Carrowan and Deputy Collins. During a license and registration check, these officers, who were being assisted by Trooper Darrell Bass of the North Carolina State Highway Patrol, detected the odor of marijuana coming from the vehicle. Deputy Collins was dispatched to obtain a search warrant for the truck. The subsequent search of the truck produced forty (40) bales of marijuana.

After the search of the truck, a second search warrant was obtained for the property owned by Petitioner Nunzio Lombardo. When that warrant was executed, Petitioners Nunzio Lombardo, Dennis Lombardo, Vincent Lorusso and Clark Oldenbrook were arrested. In the search of the Lombardo property, numerous paper items including lists, numbers, and cash money in excess of $145,000.00 were seized from the mobile home and 511 bales of marijuana were seized from the adjacent tin building.

The State of North Carolina presented testimony at the hearings on the Motions to Dismiss by Deputy Carrowan, Deputy Collins, Trooper Bass and Special Agent Lewis Young

of the State Bureau of Investigation. The decision to stop the Trapper vehicle was made by Deputy Carrowan whose testimony established that he reasonably believed the vehicle and Petitioner Trapper were engaged in criminal activity when stopped.

Deputy Carrowan is a life-long resident of the isolated area in Hyde County where the Lombardo property was located. (R.p. 64). He was raised on Fortiscue Creek and still lives on the creek having been a commercial fisherman for a lot of his life. (R.pp. 60, 61, 91). He had been a deputy sheriff for twelve (12) years prior to hearing.

Deputy Carrowan first met Petitioner Nunzio Lombardo about two years before the hearing when he first came to Hyde County to buy land. While the Deputy Carrowan was patrolling and in uniform, Petitioner Nunzio Lombardo beckoned to him and introduced himself to the Deputy saying that he had retired from the New York Police Force. Petitioner Nunzio Lombardo said he was interested in buying a piece of land for retirement and hunting purposes pointing out the piece of land beside which they stood talking; it was about a half-mile from Deputy Carrowan's house. (R.p. 59).

When Petitioner Nunzio Lombardo bought the property, it had no buildings on it only a small growth of timber. The land joins the main stream of Fortiscue Creek. (R.p. 59). At the Lombardo property, Fortiscue Creek has about five (5) feet channel depth. (R.p. 61). Fortiscue Creek is a dead end creek and a tributary of the Pungo River which is a part of the Inland Waterway. (R.pp. 61, 62).

Shortly after the property was purchased, a rock road was built out to the rural paved road that runs through the community. (R.p. 60). The rural paved road is one in a series of three that loops out to U.S. 264. (R.p. 97). It is about seven miles from this isolated, rural community to U.S. 264. (R.p. 69).

Around the 1st of December, 1978, Deputy Carrowan's attention was increasingly drawn to the Lombardo property.

His neighbors in the community began to complain about boat noises and truck noises coming from the Lombardo property. (R.pp. 82, 83). He also began to notice and to be asked by his neighbors about strange, out-of-state cars. In their isolated community, it is unusual to see strange, or out-of-state cars. He had also noted the metal gate, which was usually locked, at the Lombardo property. That was an unusual feature for hunting camps in the area. Deputy Carrowan also found it suspicious that a retired police officer had nothing in common with any law enforcement officers in Hyde County. (R.p. 83).

On December 21, 1978, a series of events began which convinced Deputy Carrowan that the Lombardo property was being used to smuggle marijuana. (R.pp. 81, 83). That day while he was in the courtroom, he received a call to go to Fortiscue Creek to tow a small boat, about 27 feet, out to deeper water. When he arrived, he found a 57 foot boat named the Lady Barbara from Wilmington, Delaware. (R.p. 60). The stern of the boat was floating in about two and one-half feet of water or less. The boat was housed straight up, was built like a barge, and was a perfect cargo vessel for shallow water. It was the largest boat he had ever seen in Fortiscue Creek. (R.p. 91). It was aground on the shoals at the mouth of the creek on the northwest shoreline about a mile from the Lombardo property. (R.p. 61).

As the Deputy aided the Coast Guard in towing the boat off the shoals, he talked with a person on the Lady Barbara who told the Deputy he was very cold. The man on the boat said that he could not start the motors to warm up because they were "both stuck full of mud." He told the Deputy that one of the shafts had come loose from the motor and backed down as the boat was coming up the Pungo River; the boat had then drifted into Fortiscue Creek on the shoals. The Deputy concluded that the explanation was impossible because (1) the boat would have had to drift too far against the wind; (2) a shaft does not back out when a twin motor-shaft boat is running ahead up river; and (3) the motors would not pick up mud in the Pungo River, a part of the Inland Waterway. (R.pp. 61, 62). Deputy Carrowan

concluded that the boat must have entered the river before midnight, after which time he awakened when the wind shifted to the northwest; that wind shift blew the water out of Fortiscue Creek. (R.pp. 92, 103). He reasoned that a cargo vessel such as this would be in the creek, and came in the night before, only to bring in something. (R.p. 91).

A few days after the Lady Barbara incident, Deputy Carrowan went out in the creek wearing his fishing clothes and set his net. As he neared the Lombardo property, he stopped to light a cigarette and view the property. When he did so, two shots were fired at him from the Lombardo property by a high-powered rifle. Thereafter he restricted his surveillance to the road in and out of the Lombardo property. (R.pp. 63, 64).

After the Lady Barbara incident, the neighbors began to complain more frequently about the noises, saying they were being kept awake at night. Deputy Carrowan and his wife heard the boat noises and truck noises at their house, a half mile away. (R.pp. 60, 83). Mrs. Williams, a neighbor, told the Deputy about a tractor-trailer truck she had seen enter the Lombardo property on January 8. (R.pp. 8, 102). He confirmed the reports of truck traffic by tire tracks on the highway. (R.pp. 87, 88).

On January 13, 1979, Mrs. Williams notified Deputy Carrowan that a Ford truck with a camper body had entered the Lombardo property at 5:30 that afternoon. (R.pp. 88, 102). This was the first time he had a chance to observe a truck that had entered the property before it left. (R.p. 88). He waited for the truck and at midnight he saw a Ford truck with a camper body leave the Lombardo property. He noticed, as the truck exited, that the motor was turning at too high a rate of speed for low gear; it gave him the impression that it was loaded. (R.p. 68).

Coordinating Deputy Collins and Trooper Bass by radio with prearranged signals, Deputy Carrowan followed the truck and stopped it after several miles. (R.p. 70). He

approached the truck and asked Petitioner Trapper for his license. Although he expressed to Petitioner Trapper concerns about stolen furniture, he believed the truck had marijuana in it when he stopped Petitioner Trapper. (R.p. 79). When Deputy Carrowan asked to look in the camper for stolen furniture, Petitioner Trapper replied that he did not have a key to the camper. In response to his request, Petitioner Trapper gave Deputy Carrowan the registration card for the truck. Trooper Bass ran a check on the registration and returned the card to Deputy Carrowan. (R.p. 71). Trooper Bass then walked along the passenger side of the truck and reported to Deputy Carrowan that the truck was loaded with marijuana. Deputy Carrowan and Deputy Collins went to the same area of the truck and smelled the same odor. Petitioner Trapper was arrested and detained while Deputy Collins went to get a search warrant. (R.p. 72). Trooper Collins said that he detected the odor each of the four times he walked along the passenger side of the vehicle; it was coming from a vent. (R.p. 107).

The camper part of the truck was opened only after Deputy Collins returned with the search warrant. (R.p. 72). Twenty-five (25) bales of marijuana were found inside the camper. (R.p. 73).

Based on this discovery and other facts presented, a search warrant was issued for the Lombardo property. (R.pp. 75, 118). The warrant was served on Petitioner Nunzio Lombardo by Deputy Carrowan. The mobile home and adjacent warehouse were searched pursuant to the warrant. (R.p. 118). Petitioners Lorusso, Oldenbrook, Dennis Lombardo and Nunzio Lombardo were arrested during the search. The officers seized 511 bales of marijuana, lists and cash money in excess of $145,000.00. (R.p. 121).

Special Agent Young testified that he had participated in a drug raid in Pamlico County in 1976 at Messick. That raid had resulted in the discovery of between twenty-two (22) and twenty-five (25) tons of marijuana. The marijuana seized in that raid was wrapped or packaged very similar to that seized in this case. (R.p. 127).

REASONS FOR DENYING THE WRIT

Petitioners' request that their Petition for Writ of Certiorari be granted alleging that the application of the Fourth Amendment and the exclusionary rule by the North Carolina Court of Appeals in the case *sub judice* is inconsistent with prior decisions of this Court. The State of North Carolina believes that this Petition should be denied for the following reasons:

1. It is based on the transcript of the hearing by the trial court and not on the record on appeal which the appellate courts of North Carolina considered.

2. The decision of the North Carolina Court of Appeals is consisent with the most recent application of these legal principles to the issues presented. See *United States v. Cortez*, _____ U.S. _____ 100 S.Ct. 690, _____ L.Ed. 2d _____ (1981).

3. The facts which established probable cause to issue both search warrants were lawfully obtained and sufficient to establish probable cause.

1. The Petition for Writ of Certiorari is not based on the record on appeal which the appellate courts of North Carolina reviewed to decide the issues Petitioners present for review.

Before addressing this issue, the State would like to bring to this Court's attention one point which requires clarification. The Petition consistently refers to the North Carolina Court of Appeals, Second District. See cover page, *et seq.* The State of North Carolina has two appellate courts and thirty-three judicial districts wherein criminal matters are tried. North Carolina General Statutes Chapter 7A, Judicial Department. The case, *sub judice*, arose in the Second Judicial District. The decision of the trial court, the Hyde County Superior Court, on Petitioners' Motion to Suppress was reviewed by the two appellate courts. The decision of the North Carolina Court of Appeals has been

brought forward by the Petition for review. There is only one Court of Appeals in North Carolina and there is no appeallate court known as the North Carolina Court of Appeals, Second District. The Petitioner sought review by the Supreme Court of North Carolina which denied such review by granting a Motion to Dismiss filed by the State of North Carolina.

As the Petition recognizes, there were separate records of this case at the trial court and appellate court levels. The Petition uses the symbol "MST" to refer to the Motion to Suppress Transcript and "AR" to refer to the Appellate Record in the North Carolina Court of Appeals. See footnote 2, p. 4 of the Petition and footnote 3, p. 12. The Petitioners relied exclusively on the Motion to Suppress Transcript to prepare the Statement of the Case, to present the facts supporting the Reasons for Granting the Writ, and to present Excerpts from Motion to Suppress Transcript at pp. App. 28-App. 52 of the Petitioner.

The North Carolina Rules of Appellate Procedure limit the review of appeals of right from the trial courts solely to the record on appeal as constituted according to Rule 9 of said Rules (A.1).[2] At (b)(3) of Rule 9, the evidentary portion of the record on appeal in criminal action is limited to "so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned." The portion of Rule 9(c)(1) pertinent to the issue reads as follows:

> (c) Form — General Provisions
> (1) Evidence — How Set Out. Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonal evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. (A.-3).

[2]The symbol "A." refers to the Appendix attached hereto.

Rule 15 of the North Carolina Rules of Appellate Procedures at (f)(1) provide: "The record on appeal filed in the Court of Appeals by the parties constitutes the record on appeal for review by the Supreme Court." (A.-12). That rule controlled the record on appeal for the Petition for Discretionary Review filed by Petitioners with the Supreme Court of North Carolina.

The North Carolina record on appeal is distinguished from the "appeal on the original papers" approach in the Drafting Committee Note to Rule 9.

> While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach: 1) use of authenticated copies of trial court record items (plus recorder's transcript), rather than the original trial court papers themselves; and 2) forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief.
>
> North Carolina Rules of Appellate Procedure, pp. 20, 21. (A.-5, A.-6).

The North Carolina Supreme Court has held that the narration of evidence as specified in Rule 9(c) is mandatory. *Britt v. Allen* 291 N.C. 630, 231 S.E. 2d 607 (1976).

The State has requested that the clerk of the North Carolina Court of Appeals certify the record on appeal and transmit it to this Court. (A.-17).

In *Cicucci v. Illinois,* 356 U.S. 571 (1958), the Petitioner appended a number of newspaper articles regarding the trial. Neither the articles nor their subject matter was included in the record certified to this Court from the state supreme court. This Court held that the newspaper articles "not being part of the record, may not be considered here." *Ibid,* 573. Accordingly, the portions of Petitioners' brief taken from the Motion to Suppress Transcript are not a part of the record, were not considered by the state courts, and may not be considered here.

By excluding the inappropriate portions of the Petition, it is extremely difficult to ascertain the facts as reviewed by the North Carolina Court of Appeals. The record on appeal below was prepared by Petitioners' trial counsel including the counsel who prepared and submitted the Petition for Writ of Certiorari now under consideration. The Statement of Facts contains numerous quotations from the Motion to Suppress Transcript while the record on appeal is a narrative summation. It also contains facts which are not supported by the record on appeal considered by the State appellate courts. Thus, the Petitioners have so confused the facts before this Court with matters not a part of the record or considered by the state appellate courts, that the State of North Carolina believes this Court should deny the Petition under its authority as set out in Rule 21.5 of the Rules of the Supreme Court. As in *Erie R. R. v. Kirkendall,* 266 U.S. 195 (1924), the confused state of the record makes it difficult to ascertain the facts, if not impossible. The petition requesting relief fails "to give adequate information concerning the record and essential facts." *Ibid,* 185-186. The Petitioners have failed to accurately set forth the facts from the record on appeal considered by the State appellate courts thereby precluding a ready and adequate understanding of the points which require consideration as presented in the Petition.

2. The decision of the North Carolina Court of Appeals is consistent with the prior decisions of this Court and did not decide a federal question in a way which conflicts with the applicable decisions of this Court.

Since the decision of the North Carolina Court of Appeals was issued September 2, 1980, this Court has issued a decision which closely parallels the case *sub judice*. *United States v. Cortez, supra.* The State considers that case controlling and the decision of the North Carolina Court of Appeals to be consistent with that decision. The State believes that Petitioners have failed to establish that the decision of the North Carolina Court of Appeals conflicts with the applicable decisions of this Court.

a. The investigative stop of Petitioner Trapper's vehicle and the brief detention of Petitioner Trapper were permisible police actions under the Fourth Amendment.

During the past decade, this Court has issued several opinions which further refined the doctine first enunciated in *Terry v. Ohio,* 392 U.S. 1, (1968), i.e. there are certain special categories "of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make the Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway v. New York,* 442 U.S. 200, 210 (1979). In an earlier case during the 1979 term, the Court firmly established that the initial stop of a vehicle and detaining its occupants constitutes a "seizure" within the meaning of the Fourth and Fourteenth Amendment, even though the purpose of the stop was limited and the resulting detention quite brief. *Delaware v. Prouse,* 440 U.S. 648 (1979).

In *Dunaway, supra,* 211, the Court cited *Prouse* as an extension of *Terry.* Thus, a brief stop of a vehicle to question the occupant does not require a showing of probable cause, but rather may be supported by articulable facts which make the officer reasonably suspect that the vehicle or its occupant are subject to seizure for violation of the law. *Prouse, supra.*

These holdings were succinctly summarized by Chief Justice Burger in *Cortez, supra,* ___, 100 S.Ct. at 694, 695:

> The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here. *Reid v. Georgia,* ____ U.S. ____, ____, 100 S.Ct. 2752, 2753, 65 L.Ed.2d 890 (1980); *United States v. Brignoni-Ponce,* 422 U.S. *supra,* at 878, 95 S.Ct., at 2578; *Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). *Terry v. Ohio,* 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-1879, 20 L.Ed. 2d 889 (1968). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 541 (1979); *Delaware v. Prouse,* 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed. 2d 660 (1979); *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 844, 95 S. Ct. at 2581; *Adams* v. *Williams,* 407 U.S. 143, 146-159, 92 S.Ct. 1921, 1923-1924, 32 L.Ed. 2d 612 (1972); *Terry v. Ohio, supra,* 392 U.S., at 16-19, 88 S.Ct., at 1877-1879.

Deputy Carrowan testified extensively as to his reasonable suspicion that this vehicle and its driver were involved in criminal activity. (R.pp. 58-103). The trial court's order set forth the facts which led to its conclusion that the deputy had probable cause to believe that the vehicle was being put to an unlawful use at the time he stopped it. (R.pp. 170-177). All the evidence indicated that this was not a random stop forbidden by *Prouse.*

The question presented by Petitioners now may be refined; whether the facts known to Deputy Carrowan and his analysis of those facts, based on his experience, gave him a particularized and objective basis for suspecting the person

stopped of criminal activity. As this Court held in *Cortez*, the totality of the circumstances must be taken into account in reviewing the detaining officer's decision.

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighted not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra,* said, "[t]his demand for specificity in the information upon which police action is predicated is *the central*

> *teaching of this Court's Fourth Amendment jurisprudence."* Id., 392 U.S., at 21, n. 18, 88 S.Ct., at 1880, n. 18 (emphasis added). See also, *Brown v. Texas, supra,* 443 U.S., at 51, 99 S.Ct., at 2640; *Delaware v. Prouse, supra,* at 661-663, 99 S.Ct. at 1400-1401; *United States v. Brignoni-Ponce, supra,* 422 U.S., at 884, 95 S.Ct., at 2581. *Ibid,* at ____, 100 S.Ct. 695.

In the present case, Deputy Carrowan testified that, at least two weeks prior to the stop of the vehicle operated by Petitioner Trapper, he had come to the conclusion that the Lombardo property was being used to smuggle marijuana. (R.pp. 81, 83). That conclusion was based on Deputy Carrowan's personal observations, information from his neighbors, consideration of the pattern of operation of drug smugglers in coastal areas, and activities inconsistent with the prior representations of Petitioner Nunzio Lombardo.

In the opinion below, the North Carolina Court of Appeals took judicial notice of the fact "that Hyde County is on the coast of North Carolina in an area which is regularly used by smugglers of marijuana." *State v. Trapper,* 48 N.C. App. 481, 486, 269 S.E. 2d 680, review denied, 301 N.C. 405, ____ S.E. 2d ____ (1980). The State requests that this Court take judicial notice of that fact. The pattern of behavior which characterizes such activities alerted Deputy Carrowan to that possibility as to the Lombardo property. The late night noises and truck traffic pointed to such a use and refuted the earlier representations that it was a hunting camp. The Lady Barbara's night grounding and physical characteristics plus the noticeable increase in traffic and night operations after its arrival pointed to a smuggling operation. The closely guarded privacy, evidenced by the locked gate and warning shots fired at the Deputy as he approached the property from the water, and Mr. Lombardo's failure to associate with local law enforcement officers, after holding himself out as a retired policeman, reinforced the conclusions that the property and its owner were not a hunting camp and a retired policeman. From these data and the other facts more

explicitly set forth in the Statement of the Case, this trained officer, particularly knowledgeable in water related activities, drew inferences and deductions which would lead those versed in the field of law enforcement in the coastal areas of North Carolina to the conclusion that the Lombardo property was being used to smuggle marijuana. The Messick case testified to by Special Agent Young was a well publicized case of a similar nature in a county with similar geography to Hyde, separated from Hyde County by a coastal sound. As this Court has so recently recognized, the process does not deal with hard certainties, but with probabilities.

The second element of the standard from *Cortez* was also met. If the marijuana was being delivered by boat, and trucks, including tractor-trailers, were departing the Lombardo property under cover of night; it was reasonable to conclude that these vehicles were being used to distribute the marijuana to other centers of distribution. The traffic at the Lombardo property had become unusually heavy after the Lady Barbara incident. (R.p.66). The vehicle in question departed the Lombardo property at midnight after arriving at 5:30 the same afternoon; it appeared to be loaded; and it had a New York license tag. (R.pp. 68, 6). These facts are far more indicative that the vehicle stopped was engaged in criminal activity than those facts shown in *Cortez*. Therefore, the stop of the vehicle was legal.

The Petitioners relied heavily on *Reid v. Georgia*, _____ U.S. _____, 100 S.Ct. 2752, in the Petition. The State believes that case is distinguished from the case *sub judice* by its facts. It was an airport stop of an individual based on the "drugs courier profile." Unlike the defendant in that case, the decision to make an investigative stop by Deputy Carrowan was based on much more than a brief view of Petitioner Trapper or a "hunch." The facts upon which the stop of Trapper was made do not allow officers to conduct "virtually randon seizures" of a very large category of presumably innocent travelers. The reliance on *Reid* offers no support for Petitioners' cause.

3. The facts which were offered to establish probable cause were sufficient for the judicial official to find probable cause and issue the warrants.

The portion of the Petition which concerns the search warrants addresses two issues: 1) whether the search warrants were supported by sufficient facts to remain valid should this Court strike the evidence obtained as a result of the stop of the Trapper vehicle and 2) an attempt to challenge the sufficiency of the factual basis upon which the warrants were issued. The State readily agrees with the Petitioners that the statements of probable cause upon which the warrants were issued will be insufficient to establish probable cause *if* the evidence obtained from the stop of the Trapper vehicle is suppressed.

On the second question, the State believes that the Petitioners have failed to make a showing sufficient to invoke the jurisdiction of this Court under 29 U.S.C. §1257(3). There was no showing made that the facts upon which the findings of probable cause were insufficient or in conflict with prior decisions of this Court.

As to the merits of Petitioners' contentions on this point, the State considers the argument to be based solely on just the sort of hypertechnical reading of the warrant this Court discussed in *United States v. Ventresca,* 380 U.S. 102 (1965). At footnote 5 on page 20 of the Petition, it is asserted that the statement of probable cause supporting the warrant to search the vehicle "fails to indicate that the odor was coming from the truck." The statement of probable cause reads as follows:

> a strong odor or [sic] marijuana was noticed as a license check was being made on the driver of said vehicle. Information was given in confidence from a very reliable informant, also (R.p.6, 116).

The warrant was issued to allow a search of both the truck and Petitioner Trapper. (R.p.6).

The statement of above when tested and interpreted in a commonsense and realistic fashion leads to one conclusion, the strong odor of marijuana was coming from the vehicle. As this Court noted in *Ventresca,* warrants should not be invalidated "by interpreting the affidavit in a hypertechnical, rather than a commonsense manner." *Ibid,* 109. Petitioners argue for just such a result. Federal courts and North Carolina courts have held that the odor of marijuana is sufficient to provide probable cause for a search warrant to be issued. *United States v. Kleinschmidt,* 596 F. 2d 133 (5th Cir.), *cert denied,* 444 U.S. 927 (1979); *United States v. Villarreal,* 565 F. 2d 932 (5th Cir.) *cert. denied* 439 U.S. (824) (1978); *State v. Barbee,* 34 N.C. App. 66, 237 S.E. 2d 352, (1977), *cert denied,* 435 U.S. 943 (1978); This Court noted in *Johnson v. United States,* 333 U.S. 10, 13, (1948):

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

A commonsense reading of the warrant shows that the judicial official had adequate facts upon which to make a finding of probable cause that the camper contained marijuana. The search warrant was issued upon sufficient facts to show probable cause which facts had been lawfully obtained. Accordingly, this contention by Petitioners fails to establish any conflict with prior decisions of this Court or to invoke their Court's jurisdiction under 28 U.S.C. §1257(3).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied with all costs being assessed against Petitioners.

Respectfully submitted,

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APPENDIX

RULE 9

THE RECORD ON APPEAL—FUNCTION, COMPOSITION, AND FORM

(a) **Function.** In appeals of right from the district courts and superior courts, review is solely upon the record on appeal constituted in accordance with this Rule 9.

(b) **Composition.**

(1) **In Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof: (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a copy of a stipulation of counsel showing the same; (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law; (viii) a copy of the judgment, order, or other determination from which appeal is taken; (ix) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (x) copies of all other papers filed and transcripts of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned, and (xi) exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **In Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a copy of a stipulation of counsel showing the same; (iv) copies of all petitions and other pleadings filed in the superior court; (v) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (vi) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (vii) so much of the evidence taken before the board or agency and in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the superior court, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the superior court, set out as provided in Rule 10.

(3) **In Criminal Actions.** The record on appeal in criminal actions shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (iv) copies of docket entries or of a stipulation of counsel showing all

arraignments and pleas; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (ix) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned, and (x) exceptions and assignments of error set out as provided in Rule 10.

(4) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(5) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(6) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative the appellate court may order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal amended to correct error shown as to form or content.

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b)

shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promtly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appeallate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

Commentary:

General. This Rule , in subdivision (b), contains a fundamentally new approach to prescribing the compositon of the record on appeal. The traditional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(3); and appeals from superior court administrative agency reviews, subd. (b)(2). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal,it retains the two most fundamental features of the code approach: 1) use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) a forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now

ulitized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards*, 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors properly to be considered; but (2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

Subdivision (b)(1)-(3). While most of the items enumerated for inclusion in the original records on appeal in these three catagories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of

the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ. P.(12)(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), "a copy of the summons, etc.". This is designed to provide a record showing of the existence of "judicial" jurisdiction of the trial tribunal, whether personal over the defendant, in rem or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the "record proper," so must be included in the original record on appeal. *Cressler v. City of Asheville*, 138 N.C. 482 (1905) ("summons, pleading and judgment"). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the "printed" copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of "judicial" jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), "a copy of the notice of appeal, etc.". This carries forward existing practice, not formerly required by statute or rule but by judicial decison, e.g., *Atkinson v. Asheville St. Ry.*, 113 N.C. 582 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized "appeal entries" which show appeal taken orally "in open court," "further notice waived" (unnecessary), accompanied by any judicial extensions of the statutory times for serving "case" and "counter case," and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, "Appeal Entries."

Subdivision (b)(4). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (b)(5). Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of uncessary matter. Former Sup. Ct. RR. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) the sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) the costs are chargeable directly against *counsel* as well as a party in the court's discretion.

Subdivision (b)(6). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (c)(1). The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which, though necessary as context or background, is not really disputed and could be compressed fairly into summary form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in

question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and required form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record—whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal "proposed record on appeal" served upon the appellee. In the later situation an appellee might either formally object to the proposed form, or include a different form in his "proposed alternative record on appeal." In either case, judicial settlement as to the propriety of the disputed form would then be forced.

Subdivision (c)(2) deals in its two subsections with two different kinds of exhibits which may be required items in the record on appeal. Subsection (i) deals with documentary exhibits (which ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

Subdivision (c)(3). Self-explanatory. From former Sup. Ct. R. 19(1)

Subdivision (c)(4). Self-explantory. From former Sup. Ct. R. 19(1).

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15, Art. 22.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. §7A-31 for discretionary review. The petition shall be accompanied by a copy of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders: Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) Composition. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the orginal record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) **Filing and service of Briefs.**

(1) **Cases Certified Before Determination By Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared inconformity with Rule 28 in the Supreme Court and serve copies upon all other

parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 20 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be hear in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee*, a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee*, the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purpose of proceeding under this Rule 15.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. Rules 1, 2, 4, 5, 6, 8, 11, 13.

Commentary:

General. For coverage of this rule in conjunction with that of App. R. 14, see General Commentary to the latter. Not that this Rule 15 deliberately avoids use of the term "certiorari" to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms "certification," "certify for review" "petition for discretionary review," are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraodinary writ of certiorari, which is dealt with in App. R. 21.

Subdivision (a) lays the basis for the rule's coverage of both by-pass and post-determination review procedures.

Subdivision (b) carries forward the time limits for petition for discretionary review provided in former Supp.R. 1 (by-pass) and Supp. R. 22 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

Subdivision (c). The provision for accompanying a post-determination petition with a copy of the Court of Appeals' opinion is from former Supp.

R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence . . . the discretionary review is based," but extends to all questions then "property presented in the new briefs."

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

Subdivision (d). Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule's features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

Subdivision (e). Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged i substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

Subdivision (f). Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. r. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

Subdivision (g). Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in "by-pass" review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed; as to the appellee's brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant's brief.

2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Sup. Ct. RR. 28 and 29.

Subdivision (h) carries forward the comparable provision in former Supp. R. 2, and is dawn ultimately from G.S. § 7A-31.

Subdivision (i). From former Supp. R. 4.

RUFUS L. EDMISTEN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
RALEIGH
27602

20 March 1981

Honorable Francis E. Dail
Clerk
Court of Appeals of North Carolina
P. O. Box 2779
Raleigh, North Carolina 27602

RE: State v. Trapper, et al
NO. 7928SC1188

Dear Frank:

Attached please find a copy of a letter, dated March 3, 1981, from the Honorable Alexander L. Stevas, Clerk to the Supreme Court of the United States. In that letter, this office was requested by the Court to respond to the petition for writ of certiorari filed in that Court, on January 13, 1981, by the defendants below requesting that Court to review the order of the Court of Appeals of North Carolina in the above-referenced case.

Pursuant to Rule 19.1 of the Rules of the Supreme Court of the United States, the respondent, the State of North Carolina, hereby requests that you certify and transmit to the Supreme Court of the United States the record in State v. Trapper, et al. The respondent considers the record essential to a proper understanding of the case in the brief in opposition by the Supreme Court.

Thank you for your assistance in this matter.

Sincerely,

RUFUS L. EDMISTEN
Attorney General

Daniel F. McLawhorn
Assistant Attorney General

DFMcL/dw
cc: The Honorable Alexander L. Stevas
Joel Hirschhorn, Esq.